United States Circuit Court, Districts of Missouri.

WELCH *v.* STE. GENEVIEVE.

A municipal corporation created by legislative act is not *dissolved* by its failure to elect officers.

In this country, officers do not, in the sense of the English books, constitute an *integral part* of the corporation, but they are the mere agents or servants of the corporate body.

Municipal corporations cannot be dissolved by the courts for non-user or misuser of their powers or franchises.

Where a judgment existed against a municipal corporation, having no property subject to sale, and whose duty it was to levy and collect a special tax to pay the judgment, and where the corporation was without officers, and would not, though having the power, supply itself with officers, the court *appointed its marshal* to assess, levy, and collect the requisite tax; but suspended the order so as to allow the corporation to reorganize and itself to collect the tax.

The *Ousting Ordinance* passed by the Constitutional Convention of Missouri and the General Town Incorporation Act of that state, construed and applied.

MOTION to appoint a commissioner to levy and collect taxes to pay the plaintiff's judgment.

On September 9th 1865, the plaintiff filed in this court his declaration on certain negotiable bonds issued by the city of Ste. Genevieve, and the summons was served on the 11th of the same month on "Francis C. Rozier, President of the Board of Aldermen and acting Mayor" of the said city. The record in that case recites an appearance by counsel for the city and an agreement that the defendant will enter its appearance at the next term. At the October Term, 1866, judgment by default was rendered against the defendant for $5605.

In May 1870, the plaintiff filed his petition in this court for a *mandamus*, stating therein the recovery of the above-mentioned judgment; that execution has been issued and and returned *nulla bona;* that the debt remains unpaid; that no tax to pay the same has ever been levied; that Francis C. Rozier was the last elected mayor and certain other persons named were the last aldermen of the city; that they duly qualified when elected, and served and are still in law officers of the corporation; that no election has been held, and that the failure to elect is for the purpose of preventing the petitioner and others from collecting their bonds; that there is no way in which the petitioner can collect but by the relief prayed for, which is for a writ of *mandamus* to compel

Rozier and the aldermen named to levy a tax upon the inhabitants and property of the city sufficient to pay the judgment.

An alternative writ was issued as asked, to which, at the October Term 1870, Rozier and the other persons named made return as individuals and not as mayor and aldermen of the city. They set out in substance in this return, that they were the mayor and aldermen of the city on the 4th day of July 1865; that on that day the new State Constitution was put into force, containing an ordinance (popularly known as the "*Ousting Ordinance*"), by which it was provided that within sixty days thereafter every person holding any office of honor or profit under the state, and in *any municipal corporation*, should take and subscribe the oath of loyalty therein prescribed, failing to take which oath within sixty days, said office, it was declared, should *ipso facto* become vacant, and the vacancy should be filled according to the law governing the case; and it was made penal to hold or exercise any of said offices without having taken and subscribed the oath.

The said persons returned that they failed to take the oath, whereby their offices became vacant on the 4th day of September 1865 (five days before plaintiff's original suit was brought), and they have not since acted. It was also stated in the return, that in August 1865, a pretended election was held, and city officers elected who had taken the oath of loyalty, but that these persons refused to qualify, and never did qualify or act; no record of this election could be found.

The return referred to the act of the legislature of Missouri, approved February 19th 1866 (Stats. 1865, p. 911), which recites that "on account of past troubles of the country, certain incorporated towns and cities in this state have failed to hold their regular elections for offices now vacant and elective under their respective charters," and enacts "that any justice of the peace residing within the limits of any such incorporated town or city is required on the petition of twenty-five qualified voters of such town or city, to order at once a special election to fill all vacancies in offices elective under their respective charters," &c.

The return stated that no election whatever had been held under the last-mentioned act, and that the books and papers of the corporation are in the office of the clerk of the court.

The return then set up that, on the 4th of June 1867, the County Court of Ste. Genevieve county, acting under the gen-

eral laws of the state concerning municipal corporations, declared the "town of Ste. Genevieve" incorporated by the name of "The Inhabitants of Town of Ste. Genevieve," and a certified copy of the proceedings of the county court in this regard were filed with the return; and the respondents denied that they were officers of the city, and claimed that by the constitutional ordinance aforesaid they were absolutely forbidden to act as such officers, and they asked to be dismissed.

On this return the respondents were discharged, and Welch, the judgment-creditor, filed his petition stating the above facts, and stating that there are not now, nor have there been for some years past, any officers of any kind in said corporation; that said corporation exists; that it has no property on which to levy; that his judgment is yet unpaid, and asking this court to appoint the marshal or some competent person to assess, levy and collect upon the taxable property within the corporation a tax sufficient to pay the judgment.

Glover and *Shepley*, for the plaintiff.

Thomas C. Reynolds, contrà (*Amicus Curiæ*).

DILLON, Circuit J.—This application presents novel and interesting questions, some of which are of first impression. These will be noticed, however, only so far as may be necessary to reach a conclusion. The city corporation not now appearing by counsel, and the record of the judgment upon the bonds against the city reciting an appearance by it and service of the summons having been made upon the last chief officer of the city, the validity of the judgment must, in this proceeding, be assumed: 1 Rev. St., 1855, sect. 2, art. 2; *Muscatine Turnverein* v. *Funck*, 18 Iowa 469.

The city of Ste. Genevieve was specially incorporated in 1849 by a public act of the legislature of the state: Laws 1849, 298. Its charter has been several times amended, and it was in 1851 expressly authorized to issue the bonds to the plank-road company on which the plaintiff's judgment was rendered (Act Feb. 7th 1851), and it was subsequently authorized to levy and collect annually a special tax, to pay interest on such bonds: Act Feb. 23d 1853.

The constitution of the corporation is after the usual model

of municipal corporations having a special charter; the inhabitants are the corporators, the mayor is the chief executive officer, and the aldermen constitute the governing body.

It is suggested that the corporation thus created has been *dissolved* because of its failure to elect municipal officers, and the disuse of its corporate functions since September 4th 1865, when all of the municipal offices became absolutely vacant by force of the ousting ordinance passed by the Constitutional Convention. To this proposition I cannot give my assent. I deny that a corporation created by the legislature for the purpose of local municipal government can, without a provision to that effect, be *dissolved* by the mere failure to elect officers. The corporation is created by the charter. The officers do not constitute *the* corporation, nor does the council even constitute *a* corporation. The inhabitants of the designated locality are the corporators. The officers are the mere servants or agents of the corporation. Municipal corporations are created for public purposes, being auxiliaries of the state to assist in local administration.

The effect at common law of the dissolution of a corporation was that debts due by and to it were discharged and its property reverted to the grantors. Formerly corporations of all kinds in England, both private and municipal, were usually created by royal charter, and the courts in that country have held or assumed that the loss of an integral part would dissolve a municipal corporation, or at least suspend its existence, and that its charter might, for a misuse of its franchises, be declared forfeited by judicial sentence in *quo warranto*, as in the famous case against the city of London in the time of Charles II. Upon a critical examination of the decisions in England, I doubt whether it is settled law even in that country, that a municipal corporation can be totally *dissolved* in either of these ways; but if so, the doctrine has no application to our municipal corporations, which are brought into existence for public purposes by legislative act, and which do not, in the sense of the English books, consist of integral parts.

For non-use or misuse courts may judicially declare forfeited the charters of private, but not public corporations.

The charter or constituent act of the corporation of Ste. Genevieve not being limited in duration, and not having been repealed

by the legislature, is still in force and the artificial body which it created still exists.

Under the Constitution of the United States, which prohibits a state from passing any act which impairs the obligation of contracts, it may be doubted whether it would be possible even for the legislature of the state, notwithstanding its general supremacy over the public corporations, to dissolve a corporation so as to defeat the rights of its creditors: *Van Hoffman* v. *Quincy*, 4 Wall. 537; *Butz* v. *Muscatine*, 8 Wall. 583.

But if the state has the power it has not attempted to exercise it; on the contrary the Act of February 19th 1866, recognises in the clearest terms the corporations as still existing, notwithstanding their failure to hold their elections for offices made vacant by the ousting ordinance, and provides a method by which elections may be held and corporate officers supplied. There is much discussion in the adjudged cases, and some contrariety of opinion with respect to the right of officers to hold over in the absence of express provision beyond their terms and until their successors are elected and qualified. But that question is not in this case, because whatever might otherwise be the legal right of the officers of the city to hold over, they cannot do so if they fail to take the oath required by the ousting ordinance.

The officers of the city having failed to take the prescribed oath, their official existence was absolutely at an end on the 4th day of September 1865, and at that time the corporation had no legal officers. The corporation offices became vacant, and not having been filled are still vacant. And we have the anomaly presented of a public corporation without any officers *de jure* or even *de facto* to execute its powers or fulfil its duties.

It is not suggested that the old corporation, if not dissolved in the manner before considered, was nevertheless dissolved or superseded by the organization in 1867, of the *town corporation* by the County Court under the general laws of the state: Rev. Stat. 1865, chap. 41, p. 240.

If it was thus superseded the inquiry would arise whether the town corporation was anything more than the authorized legal successor of the old corporation, and bound to discharge its obligations.

But on examining the above-mentioned statute, under which the supposed new incorporation was attempted and on which it

rests for all the legal virtue it possesses, we find that it only authorizes, in the mode therein prescribed, the incorporation of towns and cities not already incorporated. It does not empower a town or city incorporated by special charter, and which cannot therefore destroy its corporate life at its own pleasure, to abandon its charter without the consent of the legislature which gave it, thereby leaving the locality without municipal government or rule.

Legislative sanction is, in this country, indispensably necessary to the existence of every corporation; and as this new town organization is without legislative authority, it is wholly without validity, and its officers have no right in law to exercise powers under the general corporation act; much less have they the right to exercise the functions of officers under the special charter.

The city corporation being that which was established by the legislature under the charter, and that corporation remaining in existence, although it is without officers, it is clear that no validity can attach to an unauthorized organization under the general law. Offices must be *de jure*, but officers may be such *de facto*. To say that an officer is one *de facto*, when the office itself is not created or authorized by the legislature, is a political solecism, having no foundation in reason nor support in law: *Decorah* v. *Bullis*, 25 Iowa 12, 18; *Hildreth's Heirs* v. *McIntire's Devisees*, 1 J. J. Marsh. 206; *The People* v. *White*, 24 Wend. 520, 540.

If the gentlemen who are claiming under the new organization to be the officers of the town had been elected under the *charter*, though irregularly, and were exercising and claiming to exercise the powers given by the charter, which is still the organic act of the municipality, they would be, in the true sense of the term, *officers de facto*, and their acts as respects the public would be valid, and this court might, notwithstanding the irregularities in their election, issue its *mandamus* to them to levy and collect the tax necessary to satisfy the plaintiff's judgment.

But they were not elected under the charter, nor do they claim or assume to be officers of the city; and hence they could not lawfully levy or collect the tax; and there is no duty resting upon them in this respect, which this court could compel them to execute by its writ of *mandamus*.

The corporation under the special charter and its amendments is the legal and only corporate body; the new organization is a bold usurpation of the franchises of the state, and its acts, unless

ratified by the legislature, are simply void: *Decorah* v. *Bullis*, 25 Iowa 12.

Thus we perceive the suggestion that the new organization destroyed or superseded the old corporation to be unfounded. Not only so, but the foregoing observations answer the further suggestion that the creditor should cause a writ of *mandamus* to be issued and directed to the officers who are acting under the new town organization.

The way is thus cleared to the immediate question which the court is called upon to decide, viz.: Whether it will appoint its marshal or some other proper person to assess and collect from the property of the municipality a tax sufficient to pay the plaintiff's debt.

For that debt he has the judgment of this court. Execution has been returned *nulla bona*. If the corporation had officers a *mandamus* to require them to levy and collect the tax would be a remedy not only proper in itself, but one to which the judgment plaintiff is entitled as of right. This is settled law in this court, and it is not necessary to cite cases upon the subject decided by the Supreme Court of the United States. The corporation, however, has no officers, and we fear it is but too plain that the reason why the inhabitants do not elect officers under the Act of February 19th 1866, is that they cherish the delusion that they can defeat the rights of creditors, and by taking on a new organization escape old liabilities. Such notions of justice or corporate morality, if entertained, receive no countenance in the legislation or judicial decisions in Missouri or elsewhere: *Lindell* v. *Burton*, 6 Mo. 361; Rev. St. 1865, p. 244; *Butz* v. *Muscatine*, 8 Wall. 575, 581–3–4; *Bank* v. *Patton*, 1 Rob. (La.) 499; *Van Hoffman* v. *Quincy*, 4 Wall. 537.

This court must protect and enforce the rights of its constitutional suitors. The sending of its marshal into an indebted municipality, armed with authority to levy and collect a tax, is the exercise of a delicate and extraordinary power, to be avoided whenever possible; but which it will use whenever judgments it renders cannot otherwise be enforced: *Riggs* v. *Johnson County*, 6 Wall. 166, 198; *Lansing* v. *Treasurer, &c.*, 9 Am. Law Reg. N. S. 415.

Were there any municipal officers *in esse*, the court certainly would not, in the first instance appoint its marshal, but would issue its command to them.

Under the peculiar circumstances of this case, which is without a precedent, there seems to be no remedy to the plaintiff but to make the order he asks.

Anxious, however, to avoid, if it may be, the carrying of this order into effect, and allow the corporation time to elect officers and itself to levy and collect the tax, the execution of the order will be suspended for the space of three months, and the right reserved to suspend it longer if a showing be made to the court, or either of its judges, that an election of municipal officers, as provided by the law and charter, has been duly held, and that the proper body has levied and is proceeding, according to law, to collect the taxes necessary to satisfy the plaintiff's judgment. Ordered accordingly.

TREAT and KREKEL, JJ., concurred.

United States Circuit Court, Southern District of Georgia.

IREDELL P. DAVIS *v.* ELIZABETH HATCHER, EXECUTRIX OF SAMUEL J. HATCHER.

The statutes of limitations of the state of Georgia passed during the war, however defective they may have been in point of original authority, were ratified by the Constitution of 1868,[1] and are valid.

A surety is discharged where the creditor after notice and request, has been guilty of a delay which amounts to gross negligence, and by his negligence the surety has lost his security or indemnity. But the omission of the creditor to sue a principal residing in another state could not, under any circumstances, as between him and the surety, make him chargeable with gross negligence.

THIS was an action of *assumpsit* commenced on the 31st of December 1869, on a promissory note, dated at Columbus, Ga., December 30th 1858, given by Reuben Allison as principal and Samuel J. Hatcher as surety, to P. J. Phillips, executor of H. H. Lowe, or bearer, for the sum of $1125, payable on the 1st of

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[1] The Constitution of 1868 is the present Constitution of Georgia, ordained and adopted by the Georgia Convention assembled in pursuance of the Reconstruction Acts of Congress; ratified by the people of Georgia at an election held in April 1868, under order from Major-General Meade. Accepted by the Congress of the United States on the 25th June 1868, with certain conditions: Public Laws of United States 1867–8, pp. 73, 74; and assented to by the General Assembly of Georgia on the 21st day of July 1868.—ED. AM. LAW REG.